

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 31.03.2011
Judgment Pronounced on: 06.04.2011

+ **IA No. 4427/2011 in CS(OS) No. 669/2011**

TANU GOEL & ANR.

.....Plaintiff

- versus -

GIRISH CHOPRA & ORS.

.....Defendant

Advocates who appeared in this case:

For the Plaintiff: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Sudhir Talwar.

For the Defendant: Mr. Sanjay Goswami

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

V.K. JAIN, J

1. This is a suit for specific performance of an agreement to sell dated 15th June, 2010 whereby the defendants agreed to sell the entire third floor with terrace rights of property No. 9, Sukhdev Vihar, New Delhi to the plaintiffs for a consideration of Rs. 4 Crore 25 Lacs. A sum of Rs.50 Lacs was paid to the defendants at the time of

execution of the agreement and the balance sale consideration was agreed to be paid on or before 15th August, 2010. The possession of the premises, the subject matter of the agreement, was agreed to be given to the plaintiffs at the time of registration of the sale deed, after receiving the full consideration.

2. It was stated in the agreement that the defendants have taken a home loan from the Bank of Baroda and that they had assured the plaintiffs that on or before the registration of sale deed, the loan will be returned to the bank and all installments in respect of the portion being sold to them would be cleared. Photocopies of all the relevant documents were handed over by the defendants to the plaintiffs at the time of execution of the agreement.

3. In terms of the aforesaid agreement dated 15th June, 2010, the plaintiffs made further payment of Rs. 25 Lacs by way of a cheque in favour of the defendant no. 1. Yet another payment of Rs. 25 Lacs was made by the plaintiffs by way of a cheque in favour of defendant No.3 Divij Infra Projects Private Limited, in which the defendant nos. 1 and 2 were the directors. This according to the plaintiffs, was done on the request of defendant nos. 1 and

2. It is alleged in the plaint that despite repeated requests from the plaintiffs, the defendant nos. 1 and 2 did not provide No Dues Certificate from Bank of Baroda in respect of the home loan taken by them and sought some more time to perform their part of the contract in terms of the agreement dated 15th June, 2010. The request was acceded to by the plaintiffs, though they were always ready with the entire balance sale consideration and had also got a home loan of Rs. 2 Crore 91 Lacs sanctioned from the Standard Chartered Bank on 31st July, 2010 and had also delivered the copy of the sanction letter to defendant nos. 1 and 2.

It is also alleged that at the time of payment of Rs. 25 Lacs by way of the cheque in favour of defendant no. 3, the defendant nos. 1 and 2 had assured the plaintiffs that they would execute the sale deed on or before 31st October, 2010. According to the plaintiffs, defendant nos. 1 and 2 did not come forward to execute the sale deed even by 10th November, 2010 and verbally agreed to sign an addendum dated 10th November, 2010 after fixing and finalizing the date by which the sale deed was to be executed in favour of the plaintiffs. They however did not sign the addendum. Since sale deed in favour of the plaintiffs has not been

executed despite e-mails and legal notice sent to defendant nos. 1 and 2, they are now seeking specific performance of the aforesaid agreement dated 15th June, 2010. The plaintiffs have sought an interim injunction restraining the defendants from creating any third party interest in the premises the matter of the agreement dated 15th June, 2010, during the pendency of the suit.

4. In their reply to the application, the defendants have admitted execution of the agreement dated 15th June, 2010 as also the receipt of Rs.1 Crore from the plaintiffs. It is stated in the reply that as per the terms of the agreement, in case of their failure to obtain permission from the Bank of Baroda and get the documents registered in favour of the plaintiffs on or before 15th August, 2010, the defendants had a right to return the advance payment to the plaintiffs along with interest thereon @ 12.5% per annum on or before 15th September, 2010 and therefore, they had offered to refund the aforesaid advance money to the plaintiffs who refused to accept the same. It is further stated in the reply that the Bank of the defendants was not agreeable to release the third floor.

5. The plea taken by the defendants is based on the

following clause contained in the agreement dated 15th June, 2010:-

“That the second party fails to get the registry done in favour of Second Party on or before 15th August, 2010, the First Party have the right to return the advance amount paid to the First Party, with an interest of 12.5% per annum to the Second Party on or before 15th September, 2010.”

A perusal of the agreement dated 15th June, 2010 would show that the defendant nos. 1 and 2 namely Girish Chopra and Ashima Chopra were the first party and the plaintiffs namely Tanu Goel and Sunil Goel were the second party to the agreement. The above referred clause to my mind means that if the purchasers i.e. the plaintiffs failed to get the sale deed registered in their favour on or before 15th August, 2010 which was the last date stipulated for payment of the balance sale consideration and registration of the sale deed, the sellers i.e. the defendant nos. 1 and 2 would have a right to return the advance which they had received from the plaintiffs, on or before 15th September, 2010, along with interest @12.5% per annum. This clause does not mean that if sellers i.e. defendant nos. 1 and 2 fail to execute the sale deed in favour of the plaintiffs on or before 15th August, 2010, they would have a right to refund

the advance received by them by 15th September, 2010 along with interest @ 12.5 % per annum. It would be illogical to say that the parties agreed that the sellers even if they themselves commit default in performing his part of the contract, would have a right to return the advance received by them. Logically, such a right is given to the vender only on account of failure of the vendee to perform his part of the contract. It is difficult to accept that the plaintiffs had agreed that the defendants would be allowed to take advantage of their own breach, firstly by not obtaining requisite clearance from their bank despite committing so in the agreement, and then back out of the agreement by refunding the part consideration received by them.

The interpretation sought to be given by learned counsel for the defendants is neither logical nor borne out from the above referred clause of the agreement.

6. In any case, there is absolutely no material on record to show that the defendant Nos. 1 and 2 had, on or before 15th September, 2010, offered to refund the advance money which they had received from the plaintiffs. Vide e-mail dated 11th November, 2010 to defendant no. 1, Mr. Upender Tiwari, representative of the plaintiffs sent a copy

of the addendum to him and requested him to sign the draft agreement of common area uses and other relevant agreement. Vide another e-mail dated 15th November, 2010, sent to defendant no. 1 with copy to plaintiff no. 2, he was requested to sign the addendum and it was informed that the plaintiffs were ready with cash for the registry. Vide e-mail dated 24th November, 2010, defendant No. 1 was requested by Mr. Upender Tiwari to send his bank details for making demand draft and was informed that cash is ready for registry. Vide e-mail dated 4th January, 2011, Mr. Upender Tiwari informed defendant No. 1 that the plaintiffs were ready with cash of Rs.3.25 Crore and that though he was supposed to do the registry on 16th August, 2010, he had increased the time by 15 days whenever he was called. It was further stated in this e-mail that defendant no. 1 had committed to do the registry on 10th January, 2011. There was no reply from the defendant No. 1 to these e-mails. A legal notice dated 21st January, 2011 was thereafter sent by the plaintiffs to defendant Nos. 1 and 2, calling them upon to accept the balance sale consideration of Rs. 3.25 Crore and execute the sale deed. There is no material on record to show that the defendant nos. 1 and 2 had replied to this

legal notice. The receipt of the legal notice and e-mails has not been denied in the reply filed by the defendants. Had the defendants offered to refund the advance money to the plaintiffs as is claimed by them, they would definitely have controverted the e-mails and legal notice received by them from the plaintiffs. Their failure to respond to the e-mails and legal notice, coupled with absence of any document in this regard, indicates that they did not offer to refund the advance money which they had received from the plaintiffs. Therefore, even if I assume that the agreement dated 15th June, 2010 gave an option to defendant nos. 1 and 2 to refund the advance money along with interest, on or before 15th September, 2010, they failed to avail that option and consequently, it is not open to them to refund the advance money at this stage.

7. Even if I proceed on the assumption that the above referred Clause contained in the agreement dated 15th June 2010 gave an option to defendants 1 and 2 to refund the advance money in case of their own failure to execute the sale deed in favour of the plaintiff, that by itself does not disentitle the plaintiffs from seeking specific performance of the agreement. There is no express covenant in the

agreement that the vendee shall not be entitled to seek specific performance of the agreement through intervention of the Court. If one party to the agreement fails to perform his part of the contract without any legal justification, the other party to the agreement has a legal right to seek enforcement of the agreement through process of the Court, provided that the agreement is otherwise enforceable in law. The parties need not expressly refer to such legal right in the agreement which they execute for evidencing the transaction entered into between them. To seek enforcement of an otherwise valid agreement, being a legal right, and performance of the agreement, being a contractual obligation, omission to specifically contain such a stipulation in the agreement would be of no consequence.

8. In support of his contention, the learned counsel for the defendants has relied upon the decision of the Supreme Court in **Dadarao & Anr. v. Ramrao & Ors.** *JT 1999 (8) SC 608*. In the case before Supreme Court, the agreement inter alia provided that in case the sale deed is not made by the vendor to the vendee or if the vendee refuses to accept, the vendor, in addition of earnest money, will give an amount of Rs.500/- to the vendee and no sale

deed will be executed. The trial Court denied specific performance of the aforesaid agreement on the ground that jurisdiction to decree was a discretionary one and interest of justice demanded that no decree for specific performance should be passed. In coming to this conclusion, the trial Court noticed that the vendor Balwant Rao had since died and the defendants, who were his nephews, had sold whatever properties he had left. The first Appellate Court, however, passed a decree for specific performance and the decision of the first Appellate Court was upheld by the High Court. During the course of judgment, Supreme Court *inter alia* held as under:-

“But what is important is that the agreement itself provides as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. In that event the agreement provides that in addition to the earnest money of Rs.1,000/- a sum of Rs.500/- was to be given back to Tukaram Devsarkar and that “no sale deed will be executed”. The agreement is very categorical in envisaging that a sale deed is to be executed only if both the parties agree to do so and in that event of anyone of them resiling from the same there was to be no question of the other party being compelled to go ahead with the execution of the sale deed. In the event of the sale deed not being executed, Rs.500/-, in addition to the return of Rs.1,000/-, was the only sum payable.

This sum of Rs.500/- perhaps represented the amount of quantified damages or, as the defendants would have it, interest payable on Rs.1,000/-.”

9. The decision in the case of Dada Rao (Supra) came up for consideration before the Supreme Court in **P. D'Souza v. Shondrilo Naidu** (2004) 6 SCC 649, the relevant clause in the agreement of sale read as under:

“7. That if the vendor fails to discharge the mortgage and also commits any breach of the terms in this agreement and fails to sell the property, then in that event he shall return the advance of Rs. 10,000/- paid as aforesaid and shall also be liable to pay a further sum of Rs. 2,000/- as liquidated damages for the breach of the agreement.”

It was held by Supreme Court that it was for the plaintiff to file a suit for specific performance of a contract, despite having an option to invoke the option provision and it would not be correct to contend that only because such a clause exists a suit for specific performance of a contract would not be maintainable.

Regarding Dada Roa (Supra) the Court held that the decision having been rendered without noticing and considering the provisions of Section 23 of Specific Relief Act and without considering the binding decision in **M.L.**

Devender Singh and Ors. v. Syed 1973 (2) SCC 515, was per incuriam. The Court was of the view that Dada Rao (Supra) does not create a binding precedent.

10. In **Man Kaur (dead) by LRS. v. Hartar Singh Sangha** 2010 (9) UJ 4569 (SC), one of the terms of the agreement for sale of immovable property provided that if the vendor committed a default, he was to pay the double of the earnest money to the purchaser and if the purchaser committed any default, the sum of Rs 10 lacs paid as earnest money would be forfeited. The contention of the appellant before the Supreme Court was that since the agreement of sale only provided for damages in the event of breach by either party and did not provide for specific performance in the event of breach of by the vendor, their intention was that in the event of breach by the vendor, the purchaser will be entitled to double the earnest money and nothing more and, therefore, the vendee was not entitled to specific performance of the contract. Repelling the contention, the Supreme Court held that for a plaintiff to seek specific performance of a contract of sale relating to immovable property and for a Court to grant such specific performance, it is not necessary that the contract should

contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. It was further held that if the legal requirements for seeking specific performance of a contract are made out, it could be enforced even in the absence of a specific term for specific performance in the contract. Legal position was clarified by the Supreme Court giving the following illustrations (not exhaustive):

“(A). The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

(B). The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the

contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.

(C). The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance.”

11. Noticing that in the case before it, the agreement did not specifically provide for specific performance nor did it bar specific performance and it provided for payment of damages in the event of breach by other party, Supreme Court was of the view that the provision for damages in the agreement was not intended to provide the vendor an option of paying money in lieu of specific performance and, therefore, the plaintiff was entitled to seek specific performance even in the absence of a specific provision therefor, subject to his proving breach by the defendant and

that he was ready and willing to perform his obligation on the contract in terms of the contract.

12. In **Manzoor Ahmed Margray v. Gulam Hassan Aram & Ors.** 1997 (7) SCC 703, the default clause provided for payment of Rs 10,000/- as penalty in case of violation of the terms and conditions of the agreement by either party. It was held that this was a penalty clause for securing performance of the contract and would not mean that the contract is not to be performed.

13. In **M.L. Devender Singh (Supra)**, the terms of the contract between the parties provided that in case of failure to comply with the terms of the agreement, the vendor shall be liable not only for the refund of the advance received by him, but also to pay a similar amount as damages to the vendee. There was no mention anywhere in the contract that a party to it will have the option either to fulfil the contract or pay the liquidated damages stipulated for a breach, as an alternative to the performance of the contract. The Supreme Court divided the contracts into the following three classes:

- (i) Where the sum mentioned is strictly a penalty-a sum named by way of

securing the performance of the contract,
as the penalty is a bond :

(ii) Where the sum named is to be paid as liquidated damages for a breach of the contract :

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

It was held that where the stipulated payment comes under either of the two first-mention heads, the Court enforce the contract, but where it comes under the third head, the Court is satisfied by payment of money and there is no ground to compel the specific performance of the other alternative of the contract.

In the case before this Court, the contract between the parties would fall either under category (i) or category (ii) and, therefore, the Court is required to enforce the contract if the plaintiff is otherwise entitled to such a relief in law.

14. In ***Jai Narayan vs Pushpa Devi Saraf: (2006) 7 SCC 756*** Supreme Court was of the view that a stipulation in regard to payment of damages by one party of the contract to the other does not establish that the same was not an agreement for the sale.

15. For the reasons given in the preceding paragraphs, prima facie I am of the view that the plaintiffs are entitled to seek specific performance of the agreement to sell dated 15th June 2010. The defendants are, therefore, restrained from creating any third party interest in the third floor of property No.9, Sukhdev Vihar, New Delhi and its terrace and are further restrained from parting with possession of the third floor and/or terrace or any part thereof, to any person, during pendency of the suit. As noted earlier, a sum of Rs.1 Crore has already been paid by the plaintiff to the defendants. The plaintiffs have got a loan of Rs.2.91 Lacs sanctioned from Standard Chartered Bank. They are directed to deposit an FDR of Rs.34 Lacs in favour of the Registrar General of this Court within four weeks from today. The FDR will be kept alive during pendency of the suit. They are also directed to keep the sanction of the Home Loan alive during pendency of the suit.

The IA stands disposed of.

The observations made in this order shall not affect the decision of the suit on merits.

CS(OS) No. 669/2011

Written statement be filed by the defendants

within the prescribed period. Replication can be filed within two weeks of getting the copy of the written statement.

The parties to appear before the Joint Registrar on 23rd May 2011 for admission denial of documents.

The matter be listed before Court on 20th September 2011 for framing of issues.

(V.K. JAIN)
JUDGE

APRIL 06, 2011
Sd/Ag